2005

Ted Duke v. Randal Graham : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual, Plaintiffs-Appellants, vs. RANDAL GRAHAM, an individual; and DAVID GRAHAM, an individual, Defendants-Appellees.	:	Supreme Court Case No. 20051036-SC Trial Court Civil Case No. 040925274 Judge John Paul Kennedy

APPELLANTS' REPLY BRIEF

APPEAL

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(Oral Argument and Published Decision Requested)

IN THE UTAH SUPREME COURT

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual,	:	Supreme Court Case No. 20051036-SC
Plaintiffs-Appellants,	:	
vs.	:	
RANDAL GRAHAM, an individual; and DAVID GRAHAM, an individual,	:	Trial Court Civil Case No. 040925274 Judge John Paul Kennedy
Defendants-Appellees.	:	

Pursuant to Utah Rule of Appellate Procedure 24(c), Appellants Ted Duke and Maria Del Carmen Savala Cardenas (hereinafter "Plaintiffs" or "Appellants"), by and through their undersigned counsel of record John Martinez, hereby submit the following Reply Brief:

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I. Plaintiffs properly preserved all issues for appeal

Plaintiffs properly preserved all four issues for appeal as follows:

Issue I: Did the trial court violate Sections 48-2c-710(3) and 48-2c-809 of the Utah Revised Limited Liability Act by summarily confirming an arbitrator's award expelling both Appellants as members--and removing Appellant Duke as manager--of a limited liability company, even though such Sections expressly require that a "court" make an independent "judicial determination" about whether such sanctions should be imposed? (R. 371-*Opening* Brief Addendum Exh. 4, ll. 14-17, p.184; R. 202, 204-Memo. in Opposition to Defendants' Motion for TRO, *Reply* Brief Addendum Exh. 1, p.3;[1] R. 213, 215-17-Memo. in Opp. to Defendants' Motion for Confirmation of Award and in Support of Plaintiffs' Motion to Vacate Award, *Reply* Brief Addendum Exh. 2, pp.3-5)[2]

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[1]. That memorandum provides in relevant part:

II. Defendants are unlikely to succeed on the merits

Plaintiffs have concurrently herewith filed a Motion to Vacate the arbitrator's award on the ground that the arbitrator exceeded his authority. As set out in the Memorandum of Points and Authorities accompanying such Motion, the arbitrator took it upon himself to expel Plaintiffs from a limited liability company, which is a function exclusively reserved for "judicial determination" by statute and constitutional principle.

[2]. That memorandum provides in relevant part:

III.A. The Utah Revised Limited Liability Company Act Provides That Expulsion of Members of Limited Liability Companies can only be Accomplished "by judicial determination," Not by Arbitrators

The "error" that the arbitrator committed here is that UCA § 48-2c-710 (3), by its plain, express terms, provides for expulsion "by judicial determination." The Utah Supreme Court has recently stated that

> "The requirement that expulsions be made by judicial determination affords members, ... through the intervention of a neutral and impartial fact finder, the most reliable safeguard against inequitable treatment available in our society."

CCD, L.C. v. Millsap, 2005 UT 42, ¶ 26, 529 Utah Adv. Rep. 38.

Issue II: Did the trial court violate the Due Process and Open Courts Clauses of the Utah Constitution by summarily confirming an arbitrator's award expelling both Appellants as members--and removing Appellant Duke as manager--of a limited liability company, even though such Clauses guarantee Appellants a "day in court" for an independent judicial determination about whether such sanctions should be imposed? (R. 371-*Opening* Brief Addendum Exh. 4, ll. 14-17, p.184; R. 202, 204-Memo. in Opposition to Defendants' Motion for TRO, *Reply* Brief Addendum Exh. 1, p.3;[3] R. 213, 217-18-Memo. in Opp. to Defendants'

In this case, the arbitrator took it upon himself to make a determination that the Legislature expressly reserved for "judicial determination." As the Utah Supreme Court made clear, the policy reason for this reservation is to provide members of limited liability companies with "the most reliable safeguard against inequitable treatment available in our society," in order to adequately protect the substantial rights that membership in a limited liability company confers. Accordingly, only a court can determine expulsion.

B. The Utah Revised Limited Liability Company Act Provides That Managers may only be removed by Judicial Proceedings Not by Arbitrators

The Company is a limited liability company operating pursuant to the authority of the Utah statute. The Company is managed by its two Managers. Ted Duke, and Randall Graham. ... .

Section 48-2c-809 Utah Code Annotated, 1953 as amended provides as follows:

§ 48-2c-809. Removal by judicial proceeding

(1) The district court of the county in this state where a company's designated office is located, or if it has no designated office in this state, its registered office is located, may remove a manager in a proceeding commenced either by the company or by its members holding at least 25% of the interests in profits of the company if the Court finds that:

It is clear that the only authority that can remove Ted Duke as Manager is the district court in this state; not an arbitrator. A look at the balance of § 809 clearly mandates, in terms of its enforcement governance, that only a court of competent jurisdiction can remove a manager from his position as a manager of the limited liability company. ....

[3]. That memorandum provides in relevant part:

II. Defendants are unlikely to succeed on the merits

Plaintiffs have concurrently herewith filed a Motion to Vacate the arbitrator's award on the ground that the arbitrator exceeded his authority. As set out in the Memorandum of Points and Authorities accompanying such Motion, the arbitrator took it upon himself to expel Plaintiffs from a limited liability company, which is a function exclusively reserved

Motion for Confirmation of Award and in Support of Plaintiffs' Motion to Vacate Award, *Reply* Brief Addendum Exh. 2, pp.5-6)[4]

Issue III: Did the trial court err by confirming the arbitrator's award herein, even though the arbitrator made no findings to support such award and thereby failed to "make a record" as required by Section 78-31a-120 of the Utah Arbitration Act? (R. 371-*Opening* Brief Addendum Exh. 2, p.3 ("The comments are not to be construed or taken to be findings of fact or conclusions of law.")).

Plaintiffs' counsel emphasized to the trial court that the arbitrator had made only "comments," and not actual findings and the trial court, after acknowledging that fact, nevertheless ruled that the arbitrator's "non-findings" were sufficient. (R. 371-*Reply* Brief Addendum Exh. 3, p.189, ll.8-25; p.190, ll.1-25; p.191, ll.1-9)[5]

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for "judicial determination" by statute and constitutional principle.

[4]. That memorandum provides in relevant part:

IV. Due Process and Open Courts Clauses of the Utah Constitution also require that Expulsion of Members of Limited Liability Companies Can Only be Accomplished "by judicial determination," Not by Arbitrators

Plaintiffs' right to have a court determine whether they will be deprived of the substantial rights of membership in a limited liability company is also protected by the Due Process and Open Courts provisions of the Utah Constitution. The Utah Supreme Court has held that both clauses "guarantee that litigants will have [their] 'day in court'". [quoting Utah Due Process and Open Courts constitutional Clauses].

The deprivation of the right to membership in a limited liability company is a precious and protected right of property. Accordingly, Plaintiffs are entitled to their "day in court" to preserve that interest. [citing Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶38, 44 P.3d 663].

[5]. The trial court was clearly perplexed, but ruled that the arbitrator's statements were sufficient nonetheless:

THE COURT: And I've seen a lot of arbitration awards over the years; I've never seen that kind of language included in an award. ....

....

THE COURT: He says that they are provided to assist the parties and their counsel to understand the reasons that form the basis for the award. However he calls them findings of

Issue IV: Did the trial court err by refusing to award Appellants their attorney fees, costs and interest as required by Section 78-31a-126(3) of the Utah Arbitration Act? (R. 213, 221-22-Memo. in Opp. to Defendants' Motion for Confirmation of Award and in Support of Plaintiffs' Motion to Vacate Award, *Reply* Brief Addendum Exh. 2, pp.9-10)[6]

II. Defendants fail to address the pivotal question whether Sections 48-2c-710(3) and 48-2c-809 require that a "court" make an independent "judicial determination" in order to expel a member or remove a manager from a limited liability company

The arguments in Part I of Defendants' brief simply assume that a court is only required to "review" an arbitrator's award. Def. Brief, pp.14-23. Defendants thus utterly fail to address the pivotal question about the meaning of the provisions in Utah Code Sections 48-2c-710(3) and 48-2c-809 that a "court" make an independent "judicial determination" in order to expel a member or remove a manager from a limited liability company.

The starting point is the language the Utah Revised Limited Liability Company Act which provides in relevant part that a *member* of a company may be expelled:

> (3) on application by the company or another member, **by judicial determination** that the member:
>
> (a) has engaged in wrongful conduct that adversely and materially affected the company's business;

---

fact or conclusions. I don't think he has to. I think he's saying, "These are the reasons why I've given my award." And I think they are of an assist in trying to understand the whole context of the award.

(R. 371-*Reply* Brief Addendum Exh. 3, p.189, ll.23-25; p.191, ll.3-9)

[6]. That memorandum provides in relevant part:

VIII. Plaintiffs Should be Awarded Their Costs, Attorney Fees and Expenses of Litigation

Utah Code Ann. § 78-31a-126 provides for the award of costs, attorney fees and expenses of litigation in vacating an arbitrator's award. Since the arbitrator's award should be vacated in its entirety, Plaintiffs hereby request such costs, attorney fees and expenses.

. . . . or

(c) has engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member.

UTAH CODE § 48-2c-710(3) (Emphasis added). And with respect to removal of *managers* of limited liability companies, the Utah Revised Limited Liability Company Act further provides:

(1) The **district court** ... may remove a manager ... in a proceeding ... if the court finds that:

(a) the manager engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the company; and

(b) removal is in the best interests of the company.

(2) The **court** that removes a manager may bar the manager from reelection for a period prescribed **by the court**.

....

(5) If **the court** orders removal of a **manager or member** under this section, the clerk of the court shall deliver a certified copy of the order to the division for filing.

UTAH CODE § 48-2c-809 (Emphasis added).

The plain language of these sections unambiguously assigns to a "court" the *exclusive* responsibility to make a "judicial determination" in order to expel a member or remove a manager from a limited liability company. These sections thus envision an *original proceeding*, not an appellate "review" of an arbitrator's award as suggested by Defendants.

Original "judicial determinations," in contrast to appellate "review" proceedings, are those in which the power of a court "in dealing with the pleadings and evidence, in the application of the law and in the rendition of judgment according to the right of the case...is no different from what it would be if the case were begun there originally...." State v. Johnson, 100 Utah 316, 114 P.2d 1034, 1038 (1941)(citations omitted).

When the Legislature intends to provide for appellate "review" in Utah courts of proceedings previously held before other bodies or officials, it has done so in clear and unambiguous terms. See e.g., Utah Code §10-9a-801(2)(a)("Any person adversely affected by a final [land use] decision made in the exercise of or in violation of the provisions of this chapter may file a petition for review of the decision with the district court... ."); Utah Code § 19-6-205(5)(a)("Any person adversely affected by the board's [hazardous waste facility siting] decision may seek judicial review of the decision by filing a petition for review with the district court... ."). In contrast, in Sections 48-2c-710(3) and 48-2c-809 the Legislature has explicitly provided for original proceedings, not appellate review.

Defendants seek to elevate the *general* provisions of the Utah Uniform Arbitration Act dealing with arbitration remedies, with confirming arbitration awards and with vacating arbitration awards, (Utah Code Sections 78-31a-122, 123, 124, respectively), over the *specific* provisions of the Utah Revised Limited Liability Company Act requiring "judicial determinations" by a "court" in order to expel a member or remove a manager from an LLC. UTAH CODE §§ 48-2c-710(3), 48-2c-809. This would violate the fundamental principle that specific statutes control over general statutes. See e.g., Pugh v. Draper City, 2005 UT 12, ¶10, 114 P.3d 546 (code section which specifically applied to campaign disclosure statements held to govern over Election Code provision applicable to elections generally).

As a matter of policy, the Legislature obviously was concerned about the manner in which members of LLC's could be expelled, and managers could be removed, because of the extremely important rights that such membership and management positions in a limited

liability company entail. See UTAH CODE §§ 48-2c-701 ("member's interest in a company is personal property"); 48-2c-802(c) (with some exceptions, "an act of a manager ... binds the company ... ."). It is thus apparent why the Legislature therefore expressly provided for original judicial determinations, not for initial arbitrator decisions subject to petitions for review to a court. If the Legislature had intended to give arbitrators shared authority for exercising such power, *it would have said so.* Instead, courts were given that authority exclusively by way of original proceedings.

III. Defendants also fail to address the pivotal question whether the Due Process and Open Courts Clauses of the Utah Constitution require that a "court" make an independent "judicial determination" in order to expel a member or remove a manager from a limited liability company

A "day in court" is a property right protected by the Due Process Clause of the Utah Constitution as well as a liberty right protected by the Open Courts Clause of the Utah Constitution. UTAH CONST. art. I, § 7 (Due Process); UTAH CONST. art. I, § 11 (Open Courts). In Miller v. USAA Cas. Ins. Co., 2002 UT 6, 44 P.3d 663, this court held that a right to have common law claims adjudicated by a court instead of by an appraiser implicated both property and liberty concerns under those constitutional provisions.

Similarly, Plaintiffs' rights to have their membership and management positions in their LLC adjudicated by a court instead of by an arbitrator implicates both Plaintiffs' property and liberty concerns under Utah's Due Process and Open Courts Clauses. The nature of the rights to such positions is determined by the Utah Revised Limited Liability Company Act which created such status. Plaintiffs cannot be deprived of such rights unless the provisions for such deprivation *in the Utah Revised Limited Liability Company Act* are

followed. Cf. Goldberg v. Kelly, 397 U.S. 254, 261 (1970)(welfare benefits cannot be withdrawn without due process); Charles Reich, THE NEW PROPERTY, 73 YALE L.J. 733, 783-87 (1964)(government benefits are "new property" protected by procedural due process). And that statute expressly provides for a "judicial determination" by a "court."

IV. The trial court did not conduct a "judicial determination"

Defendants contend that "the four hearings held before the trial court regarding the Award" constituted a "judicial determination" regarding the merits of the arbitrator's award. Def. Brief, p.28. Close examination reveals, however, that in none of those four hearings did the trial court consider the merits of whether Plaintiffs should be expelled as members and Plaintiff Duke removed as a manager of the LLC, as required by UTAH CODE § 48-2c-710(3)("judicial determination" required to expel a member); UTAH CODE § 48-2c-809 (only a "court" may remove a manager).[7] The merits were not considered.

At the August 17, 2005 hearing, lasting 35 minutes, the trial court only considered whether to issue a TRO at the request of Defendants to maintain the *status quo*. (R. 371-Transcript of trial court hearing, Wednesday, August 17, 2005, *Reply* Brief Addendum Exh. 3, pp.16-17, 30, 37) No evidence was presented.

At the August 24, 2005 hearing, lasting 72 minutes, the trial court only considered whether to issue a preliminary injunction, also at the request of Defendants, to maintain the *status quo*. (R. 371-Transcript of trial court hearing, Wednesday, August 24, 2005, *Reply* Brief Addendum Exh. 3, pp.38, 41, 44, 92-93, 96) The trial court emphasized that it was not

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[7]. And, surprisingly, Defendants also concede that "the trial court did not address the substantive issues regarding the parties' dispute." Def. Brief, p.16.

ruling on the merits of the arbitrator's award:

> Well, the temporary restraining order, of course, is granted on the basis of probability of prevailing -- final determination prevailing. So with respect to your -- with respect to your assumption that the Court has already ruled on that, I've only ruled on the probability of prevailing not on the ultimate fact.

(Id. p.41, ll.9-14) The hearing centered on whether Plaintiffs had violated the previously-issued TRO. (Id. p.44, ll.2-8 ("THE COURT: I want to hear evidence on compliance with the order.")). But after five witnesses had testified, Defendants admitted *they had not served the TRO* on Plaintiffs, so the trial court concluded there was no violation of the TRO, and continued the matter. (Id. p.92, ll.24-25; p.93, ll.1-8)

At the September 13, 2005 hearing, lasting 84 minutes, the trial court again heard argument about whether "to convert the TRO to a preliminary injunction." (R. 371-Transcript of trial court hearing, Tuesday, September 13, 2005, *Reply* Brief Addendum Exh. 3, p.97, p.98, ll.18-19, p.155) The trial court emphasized that it was **not** considering the merits of the award:

> THE COURT: Okay. And go ahead and tell me, then, what your arguments are on converting the TRO to preliminary or permanent injunction.
>
> .....
>
> THE COURT: I'm not talking about the award. I'm talking about the Court's order that's in place, that been in place for, I don't know, a month and a half, I guess.

(Id. p.105, ll.4-6, ll.12-14) The trial court specifically informed counsel for Plaintiffs that the merits of the award were **not** under consideration:

> MR. COLESSIDES: Is the Court going to take the issue of the award, the confirmation of the award, Your Honor?
>
> THE COURT: I don't think that today is the day to do that. I think we need to hear, perhaps, more evidence on that issue. I don't want to even go into that until we have

the status re-established. So we can set another time to do that.

(Id. p.151, ll.16-23)

The October 14, 2005 hearing, lasting 61 minutes, was the only one at which the trial court had before it the Defendants' request for confirmation of the award and the Plaintiffs' request that the award instead should be vacated. (R. 371-Transcript of trial court hearing, Friday, October 14, 2005, *Reply* Brief Addendum Exh. 3, p.156, ll.12-16; p.195) Instead of making an independent judicial determination, however, the trial court simply rubber-stamped the arbitrator's award. The court signed a two-page "Order Confirming Arbitration Award" that provided simply that "The Award issued by arbitrator Kent B. Scott on August 11, 2005 (the 'Award') is confirmed. (R. 263-64; *Opening Brief* Addendum Exh. 2, ¶1, pp. 1-2) The court also signed off on the "Judgement [sic] Conforming to Arbitration Award" submitted by Appellees, which provided merely that

> "The Court granted Randal and David Graham's Motion for Order Confirming Arbitration Award and for Judgment Conforming to the Award. For the reasons set forth in the in the [sic] Award of Arbitrator Kent B. Scott dated August 11, 2005 (the 'Award'), the court enters judgment ... ."

(R. 274; *Opening Brief* Addendum Exh. 3, p.1) The "Judgement" simply "...copied everything verbatim, including nothing more, and leaving out nothing, than is set forth in the award, other than the beginning statements and the concluding signatures." (R. 371-Transcript of trial court hearing, Friday, October 14, 2005, *Reply* Brief Addendum Exh. 3, p.193, ll.8-11) The trial court emphasized that its "Judgement" "...[did not do] anything different from signing the confirmation order... ." (Id. p.194, l.4)

Indeed, the trial court referred to the arbitrator's award as "...a judicial determination." (Id. p.187, ll.14-15) The trial court concluded by emphasizing that it was making no independent determination, but simply rubber-stamping the arbitrator's award:

> "I think I've arbitrated personally over the years, as an advocate, maybe 150 arbitration cases. I have served as an arbitrator also on a number of cases. And I feel that it is a -- it is a good system, but one of the reasons it's good is because the award of the arbitrator has such a potential finality. And in this instance, it's obvious that the plaintiffs don't agree with what the arbitrator did and, you know, that's their prerogative. But that doesn't mean that it shouldn't be enforced under the law."

(Id. p.195, ll.2-11)

In summary, the merits concerned whether Plaintiffs should be expelled as members and Plaintiff Duke removed as a manager of the LLC, pursuant to UTAH CODE § 48-2c-710(3)("judicial determination" required to expel a member) and UTAH CODE § 48-2c-809 (only a "court" may remove a manager). At the first three hearings, the trial court expressly and emphatically avoided dealing with that question. At the fourth hearing, although it acknowledged the issue was before it, the trial court simply rubber-stamped the arbitrator's determination.

V. The proceedings by the arbitrator were not a "judicial determination" by a "court"

Defendants contend that the arbitration proceedings were a "judicial determination" by a "court". Def. Brief, pp.12, 24. Arbitration, however, is a "quasi-judicial" proceeding, not a "judicial" one. Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶ 32, 44 P.3d 663. And it defies both logic and language to contend an arbitrator is a "court".

If the Legislature had intended to give arbitrators the power to expel members or remove managers of LLC's, it could have provided for "quasi-judicial" determinations by "arbitrators." Instead, it provided for "judicial determinations" by "courts". Defendants' argument to the contrary seeks nothing less than to re-write legislation.

VI. The parties' arbitration agreement did not waive the right to a "judicial determination"

Making only a general reference "to the Operating Agreement's arbitration provision," Defendants contend Plaintiffs waived their right to a judicial determination as required by statute and constitutional provisions. Def. Brief, p.29.

As set out in Plaintiffs' Opening Brief, the Operating Agreement did not waive the right to an independent judicial determination because such a waiver must be "expressed in the most unequivocal terms." Lindon City v. Engineers Const. Co., 636 P.2d 1070, 1074 (Utah 1981); Opening Brief, pp.16-17. As this court has emphasized, "The dictionary definition of the word, 'unequivocal,' is as follows: 'Not doubtful; not ambiguous; clear; sincere.'" Kirchgestner v. Denver & Rio Grande Western R. Co., 118 Utah 41, 45, 233 P.2d 699, 701 (1951). And Defendants point to no such provision in the Operating Agreement waiving the right to an independent judicial determination provided to Plaintiffs by Utah Code Sections 48-2c-710(3) and 48-2c-809.

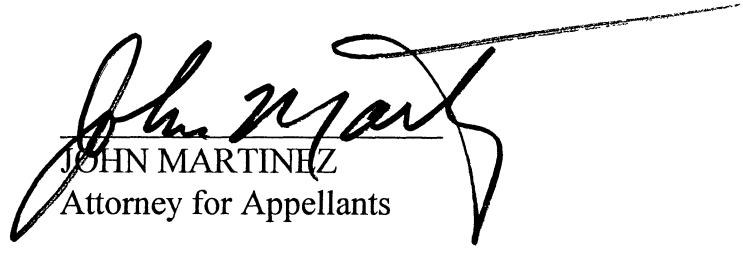
Moreover, even if such an unequivocal waiver appeared in the Operating Agreement, as also set out in Plaintiffs' Opening Brief, such a provision would be unenforceable because it would violate the express terms of state statutes meant to guarantee a judicial determination, which this court has described as "the most reliable safeguard against

inequitable treatment available in our society." CCD, L.C. v. Millsap, 2005 UT 42, ¶ 26, 116 P.3d 366; Opening Brief, pp. 17-18.

CONCLUSION

The trial court should be ordered to vacate the arbitrator's award and to issue such orders as will compensate Appellants for harms resulting from the arbitrator's unlawful award, including payment by Defendants of Plaintiffs' attorney fees, costs and interest in the proceedings below as well as on this appeal.

DATED this 4th day of May, 2006.



JOHN MARTINEZ
Attorney for Appellants

REPLY ADDENDUM

Exhibit 1: Plaintiffs' Memorandum in Opposition to Defendants' Motion for TRO (R. 202-206)

Exhibit 2: Plaintiffs' Memorandum in Opposition to Defendants' Motion for Confirmation of Award and in Support of Plaintiffs' Motion to Vacate Award (R. 213-223)

Exhibit 3: Excerpts from Transcript of trial court hearings. (R. 371)

PLAINTIFFS' REPLY ADDENDUM EXHIBIT 1

(Plaintiffs' Memo. in Opposition to Defendants' Motion for TRO)

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TED DUKE, an individual; and MARIA DEL CARMEN ZAVALA CARDENAS, an individual, Plaintiffs, vs. RANDALL GRAHAM, an individual; and DAVID GRAHAM, an individual, Defendants.	**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER** Civil Case No. 040925274 Judge Bruce C. Lubeck (Arbitrator: Kent B. Scott)

Pursuant to Rule 65A of the Utah Rules of Civil Procedure, Plaintiffs Ted Duke and Maria Del Carmen Zavala Cardenas ("Plaintiffs"), by and through their undersigned counsel of record, hereby submit the following Memorandum of Points and Authorities in Opposition to the Defendants' Motion for a Temporary Restraining Order.

INTRODUCTION

By order dated February 23, 2005, this court ordered arbitration of the parties' dispute. On Thursday, August 11, 2005, Arbitrator Kent B. Scott issued an award expelling Plaintiffs from Way Cool Dirt Cheap LLC ("WCDC"), a limited liability company of which both were members and Plaintiff Duke also was manager.

Defendants have moved for a Temporary Restraining Order. For each of the following grounds, Defendants' motion should be denied.

ARGUMENT

I. Defendants have unclean hands because they failed to move to confirm the arbitrator's award, and instead engaged in self-help which provoked a confrontation

A party in whose favor an arbitrator's award has been rendered may move to confirm the award.[1] The award by itself is not self-executing.[2] Defendants have belatedly recognized this reality by moving to confirm the award here.

Before moving to confirm the award, however, defendants by their own admission engaged in self-help and, predictably, precipitated a confrontation that the requirement for confirmation of an award is intended to avoid. Defendants therefore have unclean hands and

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[1]. Utah Code Ann. § 78-31a-123; Miller v. USAA Casualty Insurance Company, 2002 UT 6, ¶ 34, 44 P.3d 663.

[2]. See Bingham County Commission v. Interstate Electric Company, 108 Idaho 181, 183, 697 P.2d 1195, 1197 (an arbitrator's award is not self-enforcing, that is why the statute distinguishes between a "judgment" and an "award").

should not be rewarded with the equitable relief of a temporary restraining order.

II. Defendants are unlikely to succeed on the merits

Plaintiffs have concurrently herewith filed a Motion to Vacate the arbitrator's award on the ground that the arbitrator exceeded his authority. As set out in the Memorandum of Points and Authorities accompanying such Motion, the arbitrator took it upon himself to expel Plaintiffs from a limited liability company, which is a function exclusively reserved for "judicial determination" by statute and constitutional principle.

Accordingly, defendants cannot demonstrate a "substantial likelihood" of prevailing on the merits, and their request for a temporary restraining order therefore should be denied. Utah R. Civ. P. 65A(e).

III. Defendants have not supported their Motion with admissible evidence

A movant for a temporary restraining order must demonstrate the factual foundation for its request by admissible evidence.[3] Defendants' motion herein is not supported by any affidavit or other admissible evidence. The only affidavit is that made by David R. Williams; it is not admissible and therefore, should not be allowed to be considered by the Court; it contains double and triple hearsay evidence. By separate motion plaintiffs have objected to the Williams' affidavit. Accordingly, defendants' motion should be denied.

---

[3]. Utah R. Civ. P. 65A(e)("A restraining order...may issue only upon a showing by the applicant...").

IV. Defendants fail to set out the nature of the relief they seek

Nowhere in their moving papers do defendants set out what it is that they want this court to enjoin. Without a specific description of what it is they seek to enjoin, Plaintiffs could not possibly be expected to obey, and this Court could not be expected to be able to enforce.[4]

DATED this 17th day of August, 2005.

NICK J. COLESSIDES
Attorney for Plaintiffs

[4]. Utah R. Civ. P. 65A(d)("Every restraining order...shall be specific in terms and shall describe in reasonable detail...the act or acts sought to be restrained.").

CERTIFICATE OF SERVICE

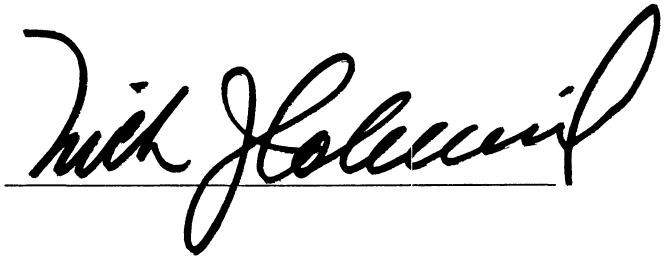
The undersigned filed the original of the foregoing with the Clerk of the Court:

OFFICE OF THE CLERK
THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

and served a copy of the foregoing upon the following:

David R. Williams
Woodbury & Kesler, PC
265 East 100 South, Suite 300
Salt Lake City, Utah 84110-3358

this 17th day of August, 2005 addressed as set forth above.



PLAINTIFFS' REPLY ADDENDUM EXHIBIT 2

(Plaintiffs' Memo. in Opp. to Defendants' Motion for Confirmation of Award and in Support of Plaintiffs' Motion to Vacate Award)

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TED DUKE, an individual; and MARIA DEL CARMEN ZAVALA CARDENAS, an individual,	:	**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR ORDER CONFIRMING ARBITRATION AWARD AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO VACATE ARBITRATOR'S AWARD**
Plaintiffs,	:	
vs.	:	
RANDALL GRAHAM, an individual; and DAVID GRAHAM, an individual,	:	Civil Case No. 04092574
	:	Judge Bruce C. Lubeck
Defendants.	:	(Arbitrator: Kent B. Scott)

Pursuant to Utah Code Ann. § 78-31a-124 and § 78-31a-126, Plaintiffs Ted Duke and Maria Del Carmen Zavala Cardenas ("Plaintiffs"), by and through their undersigned counsel of record, hereby submit the following Memorandum of Points and Authorities in support of their Motion to Vacate the arbitrator's award issued by Arbitrator Kent B. Scott on Thursday, August 11, 2005, on the ground that the arbitrator exceeded his authority, and request costs, attorney fees and expenses of litigation in overturning such arbitrator's award.

INTRODUCTION

By order dated February 23, 2005, this court ordered arbitration of the parties' dispute. On Thursday, August 11, 2005, Arbitrator Kent B. Scott ("arbitrator") issued an award expelling Plaintiffs from Way Cool Dirt Cheap LLC ("WCDC" or the "Company"), a limited liability company of which both were members and Plaintiff Duke also was one of the Managers. A copy of the Amended and Restated Operating Agreement of Way Cool Dirt Cheap, LLC., (the "Agreement" or the Operating Agreement") is appended herein marked exhibit "A" and by this reference is incorporated herein and made a part hereof.

The arbitrator based his order of expulsion on his determination that grounds for such expulsion existed under Utah Code Ann. § 48-2c-710(3)(a) and (c). As set forth below, the arbitrator thereby exceeded his authority, therefore the arbitrator's award in its entirety should be vacated.

ARGUMENT

I. Applicable Law

The parties through their agreement have provided that "The arbitration procedure shall be governed by the United States Arbitration Act, 9 U.S.C. §§ 1-16... ."[1] As this court determined in its prior order, the substantive provisions of the federal act, as well as the procedural provisions, are mirrored by the Utah Arbitration Act.

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[1]. See Exhibit "A." Amended Operating Agreement, ¶ 8.3(a).

II. The Arbitrator's Award May be Vacated for "Exceeding Authority"

Although the terms of the statutes differ somewhat, under both the federal and state statutes, the arbitrator's award may be vacated on the ground that the arbitrator "exceeded" his authority. 9 U.S.C. § 10(a)(4)("where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made; Utah Code §§ 78-31a-124(1)(d)("an arbitrator exceeded the arbitrator's authority").

An arbitrator "exceeds authority" by acting in "manifest disregard of the law."[2] An arbitrator acts in "manifest disregard of the law" when "the error is obvious and capable of being readily and instantly perceived by the average person qualified as an arbitrator" and "implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it."[3]

III. A. The Utah Revised Limited Liability Company Act Provides That Expulsion of Members of Limited Liability Companies can only be Accomplished "by judicial determination," Not by Arbitrators

The "error" that the arbitrator committed here is that UCA § 48-2c-710 (3), by its plain, express terms, provides for expulsion "by judicial determination." The Utah Supreme Court has recently stated that

"The requirement that expulsions be made by judicial determination affords members, ...

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[2]. Pacific Development, L.C. v. Orton, 2001 UT 36, ¶ 7, 23 P.3d 1035 (action in "manifest disregard of law" constitutes "exceeding authority").

[3]. Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996).

through the intervention of a neutral and impartial fact finder, the most reliable safeguard against inequitable treatment available in our society."[4]

In this case, the arbitrator took it upon himself to make a determination that the Legislature expressly reserved for "judicial determination." As the Utah Supreme Court made clear, the policy reason for this reservation is to provide members of limited liability companies with "the most reliable safeguard against inequitable treatment available in our society," in order to adequately protect the substantial rights that membership in a limited liability company confers. Accordingly, only a court can determine expulsion.

B. The Utah Revised Limited Liability Company Act Provides That Managers may only be removed by Judicial Proceedings Not by Arbitrators

The Company is a limited liability company operating pursuant to the authority of the Utah statute. The Company is managed by its two Managers. Ted Duke, and Randall Graham. Under UCA §48-2c-804(6)(d) "a manager need not be a member of the company or a resident of this state;" It is obvious that the reason that the arbitrator did not include in the AWARD the removal of Ted Duke as a manager, because he assumed that this was a "Management by Members" limited liability company, as provided for by UCA §48-2c-803. That in itself is an error.

Section 48-2c-809 Utah Code Annotated, 1953 as amended provides as follows:

§ 48-2c-809. Removal by judicial proceeding
(1) The district court of the county in this state where a company's designated office is

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[4]. CCD, L.C. v. Millsap, 2005 UT 42, ¶ 26, 529 Utah Adv. Rep. 38.

> located, or if it has no designated office in this state, its registered office is located, may remove a manager in a proceeding commenced either by the company or by its members holding at least 25% of the interests in profits of the company if the Court finds that:

It is clear that the only authority that can remove Ted Duke as a Manager is the district court in this state; not an arbitrator. A look at the balance of § 809 clearly mandates, in terms of its enforcement governance, that only a court of competent jurisdiction can remove a manager from his position as a manager of the limited liability company.

For the many reasons stated in the *CCD, LLC v Millshap* case the arbitrator's award should also be vacated in its entirety, and particularly, since the actual "AWARD" does not order the removal of Ted Duke as one of the Managers.[5] The arbitrator's written comments cannot act as authority for Ted Duke's removal as a Manager of the Company.

Respectfully, the arbitrator's award should also be reversed on those grounds.

IV. Due Process and Open Courts Clauses of the Utah Constitution also require that Expulsion of Members and Managers of Limited Liability Companies Can Only be Accomplished "by judicial determination," Not by Arbitrators

Plaintiffs' right to have a court determine whether they will be deprived of the substantial rights of membership and management in a limited liability company is also protected by the

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[5]The instrument entitled as the "AWARD" in its AWARD section does not order the removal of Duke as the Manager. However, in the part entitled "ARBITRATOR'S WRITTEN COMMENTS" on page 6, paragraph 7, the arbitrator writes that "... R. Gragam [sic] as the remaining manager." It is noteworthy that the Arbitrator does not consider the foregoing to be a part of the AWARD. He states in the introductory paragraph "The comments are **not** to be construed or taken to be findings of fact or conclusions of law." Emphasis added.

Due Process and Open Courts provisions of the Utah Constitution.[6] The Utah Supreme Court has held that both clauses "guarantee that litigants will have [their] 'day in court'".[7]

The deprivation of the right to membership and management in a limited liability company is a precious and protected right of property. Accordingly, Plaintiffs are entitled to their "day in court" to preserve that interest.

V. The Arbitrator Herein Acted in "Manifest Disregard" of the Law

The statutory requirement that expulsion must be accomplished through "judicial determination" is "obvious and capable of being readily and instantly perceived by the average person qualified as an arbitrator."[8] The constitutional foundation of that right is equally obvious.

In this case, the arbitrator expressly cited Utah Code Ann. § 48-2c-710(3)(a) and (c) as the bases for his decision to expel Plaintiffs. He thereby made it eminently *explicit* that he "appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay

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[6]. Utah's Due Process Clause, Article I, section 7 provides:
"No person shall be deprived of life, liberty or property, without due process of law."

Utah's Open Courts Clause, Article I, section 11 provides:
"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party."

[7]. Miller v. USAA Casualty Insurance Company, 2002 UT 6, ¶ 38, 44 P.3d 663.

[8]. Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996).

no attention to it."[9]

Therefore, the Arbitrator's award should be vacated.

VI. The Award Should be Vacated in its Entirety

In the remainder of his decision, the arbitrator purported to adjudicate grounds for expulsion as set out in Utah Code Ann. § 48-2c-710(3) which are reserved exclusively for "judicial determination." Accordingly, the award should be vacated in its entirety.

VII. Additional Grounds for the Vacation[10] of the Arbitrator's Award.

A. The arbitrator erred in ruling against Zavala because of the provisions of UCA §48-2c-807(3). Zavala as a member owning ten percent (10%) in and of the Company's membership interest and in the Company's profits and loses, enjoys limited immunity from liability as against the Company and to the other members by virtue of the statute which states the following:

> **§ 48-2c-807(3) Duties of managers and members**
> (3) A member of a manager-managed company **who is not also a manager owes no fiduciary duties to the company or to other members solely by reason of acting in the capacity of a member.** (Emphasis added).

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[9]. Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996).

[10]The evidence in the record before the arbitrator does not support the arbitrator's factual or legal conclusions. See: *Intermountain Power Agency v. Union Pacific Railroad Company*, 961 P.2d 320, 323 (Utah 1998) ("an arbitrator exceeds his or her delegated power if the arbitration award has no foundation in reason or fact and is, therefore completely irrational" or " utterly lacking in evidentiary support"; see also *Pacific Development L.C. v. Orton*, 2001 UT 36, ¶7 n.3, 23 P.3d 1035 ("completely irrational" ground is separate type of exceeding authority). Each one of the below listed additional grounds are not supported by the record before the arbitrator and the

There has not been produced any evidence before the arbitrator and none is cited in the AWARD which purports to show that Zavala has acted in any capacity other than as a member. At no time did Zavala become a manager of the Company. At no time did Zavala acted in any way other than in her capacity as a member. The Arbitrator's determination to apply the same legal standard to Zavala as to Duke is a manifest error.

B. The arbitrator erred in his AWARD in deciding that Duke and Zavala converted the Company's personal property. The Company was not a party to this proceedings. A conversion is an act of wilful interference with a "chattel, done without lawful justification" by which the owner entitled thereto is deprived of its use and possession[11].

Because the Company - the owner of the alleged conversion - was not a party to the arbitration, the arbitrator's AWARD should be vacated on that ground as well.

C. The arbitrator's interpretation of the non-competition clause to limit its scope to Utah is in error. Section 3.8 of the Operating Agreement of the Company is unenforceable because its geographic scope of prohibition is unreasonable.[12] The arbitrator's decision to limit the non competition agreement to Utah only is clearly erroneous, because its scope is unreasonable in its geographic application. Assuming *arguendo* that section 3.8 of the Operating Agreement can be

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[11] *Jones v. Salt Lake City Corp.*, 2003 UT App 355, ¶9, 78 P3d 988 (Ut App 2003). Conversion has been defined by the Utah Supreme Court as "a wrongful exercise of control over personal property in violation of the rights of its owner." See also *Frisco Joes Inc. v. Peay*, 558 P.2d 1327, 1330 (1977).

[12] *Allen v Rose Park Pharmacy*, 120 Utah 608, 237 P.2d 823 (1951)

modified by the arbitrator, it should be modified to apply to only the counties in which the Company operates its stores, i.e., Salt Lake County, Washington County, and Davis County.

D. Duke and Zavala acted in good faith and on advice of counsel and therefore did not convert any of the Company's personal property. Throughout the arbitration the only evidence before the arbitrator was the fact that Duke after consulting with his St. George counsel, he formed in April 2004, a new limited company, and opened new accounts for running the business in St. George. For Graham to prevail on his theory of conversion the scienter of willful conduct, is necessary. Duke acted in accordance with the following: Duke did make: (1) a request for advice of counsel on the legality of a proposed action; (2) full disclosure of the relevant facts to counsel; (3) receipt of advice from counsel that the action to be taken will be legal, and (4) reliance in good faith on counsel's advice.[13] As a matter of fact the evidence before the arbitrator was only that Duke's advice was to do exactly what Duke did. As a matter of fact, counsel for Duke, prepared the limited liability company, and he [Duke's counsel] filed it with the Utah Division of Corporations. Additionally, Duke's counsel was the person who communicated with Wells Fargo bank and established new accounts.

VIII. Plaintiffs Should be Awarded Their Costs, Attorney Fees and Expenses of Litigation

Utah Code Ann. § 78-31a-126 provides for the award of costs, attorney fees and expenses of litigation in vacating an arbitrator's award. Since the arbitrator's award should be vacated in its

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[13]. C.E. Carlson, Inc. v. Securities Exchange Commission, 859 F.2d 1429, 1436 (10th Cir. 1988)(federal securities law).

entirety, Plaintiffs hereby request such costs, attorney fees and expenses.

DATED this 17th day of August, 2005.

NICK J. COLESSIDES
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

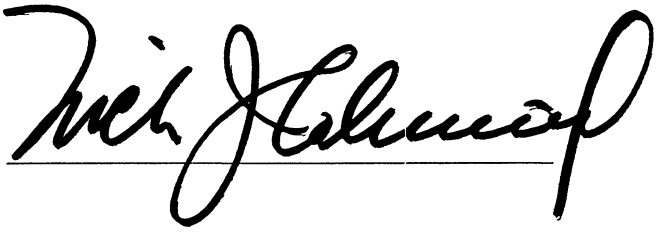
The undersigned filed the original of the foregoing with the Clerk of the Court:

OFFICE OF THE CLERK
THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84111

and served a copy of the foregoing upon the following:

David R. Williams
Woodbury & Kesler, PC
265 East 100 South, Suite 300
Salt Lake City, Utah 84110-3358

via fax;
and hand delivery
this 17th day of August, 2005 addressed as set forth above.



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PLAINTIFFS' REPLY ADDENDUM EXHIBIT 3

(Excerpts from Transcript of Hearings-R.371)

TED DUKE, ET AL,
Plaintiff-Appellant,
VS
RANDAL GRAHAM,
Defendant-Appellee.

DECEMBER 30, 2005

INDEX
DISTRICT COURT NO. 040925274
SUPREME COURT NO. 20051036-SC

EXHIBITS

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual, Plaintiffs, vs. RANDALL GRAHAM, an individual; DAVID GRAHAM, an individual; and CRAIG R. MARIGER, in his capacity as purported arbitrator herein, Defendants.	Case No. 040925274

TRANSCRIPT OF HEARINGS

February 22, 2005
August 17, 2005
August 24, 2005
September 13, 2005
October 14, 2005

BEFORE THE HONORABLE JOHN PAUL KENNEDY
District Court Judge

Jeri Kearbey
Certified Court Transcriber
1230 Gaylene Circle
Sandy, Utah 84094

TO: The Utah Supreme Court
SCOTT M. MATHESON COURTHOUSE
450 South State Street
Salt Lake City, Utah 84111

Attention: Pat Bartholomew

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

TED DUKE, an individual; and MARIA DEL CARMEN SAVALA CARDENAS, an individual, Plaintiffs, **vs.** RANDALL GRAHAM, an individual; DAVID GRAHAM, an individual; and CRAIG R. MARIGER, in his capacity as purported arbitrator herein, Defendants.	0409252274 Case No. 20051036-SC

Notice is hereby given that on the 6th day of December 2005, a transcript of proceedings held before The Honorable John Paul Kennedy, District Court Judge, on February 22; August 17; August 24; September 13 and October 14, 2005 in the above case were completed and delivered to the managing reporter at the Third Judicial District Court in and for Salt Lake County, State of Utah.

DATED this 6th day of December 2005.

Jeri Kearbey
Certified Court Transcriber
566-4540

cc: Nick J. Colessides, Attorney
David R Williams, W&K
Clerk of the Court

FILED DISTRICT COURT
Third Judicial District

DEC - 7 2005

SALT LAKE COUNTY

By _____ Deputy Clerk

SALT LAKE CITY, UTAH; WEDNESDAY, AUGUST 17, 2005, 3:09 P.M.

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THE COURT: Okay. We're here on the matter of Duke versus Graham. And, counsel, do you want to state your appearances for the record?

MR. COLESSIDES: Nick J. Colessides appearing on behalf of the plaintiffs, Your Honor.

MR. WILLIAMS: And David Williams appearing on behalf of defendants Randall Graham and David Graham.

THE COURT: Okay. This matter came to the attention of the Court on the filing of a motion for temporary restraining order by the defendants seeking to enforce the arbitration award of Kent Scott, which was handed down recently. And I have the motion for temporary restraining order, proposed order. I also have received, about 20 minutes ago, the response of Mr. Colessides to the — to the defendants' papers.

As I understand it, the parties have been operating a business located in St. George and also up here in this area. What does the business do?

MR. WILLIAMS: Your Honor, the business sells, I guess, furniture and furniture accessories imported from Mexico, pottery, ironworks, those kinds of things. It's a retail store that essentially sells furniture and furniture accessories.

THE COURT: Okay. And, apparently there was some disagreement that occurred between the parties involving the business and whether they should be allowed to open another business. Anyway, as a result of the disagreements, the parties went to an arbitration proceeding; is that correct?

As I see it, the arbitration proceeding went about seven days, and — and the decision of the arbitrator was handed down. And then the defendants have made some allegations to the effect that the plaintiffs are in at least alleged disregard of the arbitration award, dissipating assets and continuing conduct that the defendants feel is in violation of the award. Is that correct?

MR. WILLIAMS: That is correct, Your Honor.

THE COURT: And Mr. Colessides' memo basically says, "Award? What award? We don't think there's any legal award." And then — and if — "whatever there is shouldn't be enforced anyway because it's not in conformity with the law, it's exceeding the authority of the arbitrator." Is that basically it?

MR. COLESSIDES: Your Honor, yes. Except I would like to tell the Court Mr. Williams made a motion to also confirm the award. And to that motion, Your Honor, we have, obviously, no objection because that's what we wanted to have. We wanted to have the award come to the Court and be

made by affidavit?

MR. COLESSIDES: No, sir.

THE COURT: Okay. All right.

Well, the Court is — are you going to want to say anything further at this point?

MR. WILLIAMS: No, Your Honor.

THE COURT: All right.

I'm going to grant the temporary restraining order, and we'll set the matter for a preliminary injunction hearing. I'm going to further order that the status quo as of the issuance of the arbitration award be implemented. That is to say, all money, all checks that were in the bank accounts or in the cash registers of the store are to be returned forthwith. All inventory is to be returned forthwith.

MR. COLESSIDES: From where, Your Honor?

THE COURT: I don't know. If there's inventory that's been removed from storage units or from this other facility that's been described, it is to be returned forthwith, each piece.

The vehicle that has been used, after returning the equipment, the vehicle — or the inventory, rather, after returning the inventory, the vehicle is to be returned to the store forthwith.

Possession of the business shall be delivered to

MR. WILLIAMS: Okay.

THE COURT: Any further questions?

MR. WILLIAMS: No, Your Honor.

MR. COLESSIDES: No, Your Honor.

THE COURT: Okay. Then we'll be in recess.

MR. WILLIAMS: Thank you, Your Honor.

MR. COLESSIDES: Thank you.

(Whereupon, at the hour of 3:44 p.m., the hearing was concluded.)

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SALT LAKE CITY, UTAH; WEDNESDAY, AUGUST 24, 2005, 2:29 P.M.

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THE COURT: Okay. We're here on the matter of Duke v. Graham. Counsel, do you want to state your appearances?

MR. COLESSIDES: Nick J. Colessides appearing on behalf of the plaintiffs, Your Honor.

MR. WILLIAMS: David Williams appearing on behalf of Randall Graham and David Graham, the defendants. Randall Graham is here in the courtroom with me, Your Honor.

THE COURT: All right. This is the time set for preliminary hearing in this matter. This is — I think this is your burden at this point, Mr. Williams. So what I'm going to do is allow you to go first. We can do it by proffer, try to save some time, whatever you'd like, cross-examine after the proffer, or whatever you'd like to do.

MR. COLESSIDES: Your Honor, may I be heard for one moment? I'd be willing to — the time today is for the motion for a preliminary injunction to be heard for argument today. I'd be willing to stipulate to that, Your Honor. But then they have their motion for preliminary injunction. And I would further, instead of coming back again for a permanent injunction, I would also stipulate so that the matter of this part of the litigation be completed. The rest of it, Your Honor, it appears to me at least, that is

is a — we are here on a motion — in a supplemental proceeding or for a motion to enforce the award. This is a hearing for a preliminary injunction, I'm stipulating before the Court, so I don't see why waste the judicial resources.

And, number two, instead of — not only I'm stipulating to the issue of the preliminary injunction, there's no — I will stipulate to the permanency of it as well, so we don't have another hearing.

THE COURT: Well, the temporary restraining order, of course, is granted on the basis of probability of prevailing — final determination prevailing. So with respect to your — with respect to your assumption that the Court has already ruled on that, I've only ruled on the probability of prevailing not on the ultimate fact.

I'm really disturbed by the representation of Counsel that there has not been compliance with the temporary restraining order.

MR. COLESSIDES: Well, may I address that point, Your Honor?

THE COURT: Yeah.

MR. COLESSIDES: The award — the arbitrator's award came on — on Friday the 11th. I communicated that award, Your Honor, to the arbitrator — to the — to my clients. When they — over that same weekend. When they were locked out, they left and they went to — to Nevada to

think that there's been compliance with the order.

Are you asking for a contempt citation against them on this basis, or what are you asking for?

MR. WILLIAMS: I will. Yes, I do, Your Honor, because they have not complied.

THE COURT: All right. You want to present evidence on that fact, I'll hear the evidence. And let's do that first.

MR. WILLIAMS: Okay.

THE COURT: So go ahead and present your evidence.

MR. WILLIAMS: We, first, Your Honor, would like to call Maria Whitaker — Mary Whitaker, sorry.

THE COURT: Okay. Ms. Whitaker, come up and be sworn.

I can tell you now that we're going to take no more than 50 minutes to do this whole proceeding today, so let's move right along.

MR. WILLIAMS: Okay.

MARY WHITAKER,

called as a witness by the defendants,

being first duly sworn, was examined

and testified on her oath as follows:

THE COURT: I want to hear evidence on compliance with the order.

MR. WILLIAMS: Okay.

Q. Is there any inventory that you are aware of that exists but you do not have access to?

A. The access that he removed.

Q. I'm sorry?

A. The inventory that he removed from the storage units.

Q. Okay. Thank you.

A. That's the six storage units.

MR. COLESSIDES: That's all I have, Your Honor.

THE COURT: Any redirect?

MR. WILLIAMS: Yeah. One. One question.

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Is there inventory stored in storage units in St. George?

A. Yes.

Q. And do you have access to those storage units?

A. We do now. But that access was not made available to us and we were given access by the owners of those units after we discussed with them the situation.

MR. WILLIAMS: No further questions, Your Honor.

THE COURT: Any cross — recross?

MR. COLESSIDES: No, Your Honor.

THE COURT: All right. You may step down.

I have one question. That is: Do you have any

evidence to show that the temporary restraining order was served on any of the defendants?

MR. WILLIAMS: I don't, Your Honor.

THE COURT: All right. Well, I'm going to find at this point that there is no violation of the restraining order because it hasn't been served, and I'm going to continue this process and we're going to continue the temporary restraining order.

I'm going to ask that the plaintiffs provide any proceeds from any sales that they've received on any business that they have been conducting anywhere following the date of the arbitration award. That would include any business here in Utah, any business in Nevada or any other state.

I also want them to produce copies of their bank accounts and any — any accounts in their names.

Counsel, I also want you to provide for the defendants an address where the plaintiffs may be served the temporary restraining order. And can you do that today?

MR. COLESSIDES: Your Honor, I can't because I do not have one.

THE COURT: Do you have any contact — way of contacting these people? Do they have any cell phones or any —

MR. COLESSIDES: By cell phone only, Your Honor.

THE COURT: Okay.

MR. COLESSIDES: Your Honor?

THE COURT: Yes.

MR. COLESSIDES: May I ask for clarification purposes?

THE COURT: Sure.

MR. COLESSIDES: If the Court found that there is no violation of the temporary restraining order, may I — if I were to stipulate, wouldn't that obviate —

THE COURT: I've only found that he has not shown that the — the temporary restraining order has been served, and so I expect that to be served and I want to hear what the other side has to say about it. And we'll hear on the 13th what they have to say about it. Okay?

MR. COLESSIDES: Thank you, Your Honor.

THE COURT: Okay. Thank you.

THE CLERK: Court is in recess.

(Whereupon, at the hour of 3:41 p.m., the hearing was concluded.)

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SALT LAKE CITY, UTAH; TUESDAY, SEPTEMBER 13, 2005, 10:34 AM

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THE COURT: Okay, counsel, do you want to state your appearances, please?

MR. COLESSIDES: Nick J. Colessides appearing on behalf of the plaintiffs, Your Honor.

MR. WILLIAMS: David Williams on behalf of the defendants.

THE COURT: Okay. All right. This is a continuation of the prior session, and there were a number of questions that the Court had about the current status of things.

Counsel, Mr. Williams, do you want to tell me what's going on currently?

MR. WILLIAMS: I do, Your Honor.

In terms of the factual status of the case, nothing has changed since the previous hearing. What I mean by that is that none of the assets which were ordered to be returned have been returned. We had attempted a personal service of the temporary restraining order and the amended temporary restraining order, we were unable to locate the plaintiffs, but it appears that they are here today.

And so I think that, procedurally, the status is that we have several pending motions, we have our motion for a temporary restraining order, which our current motion is

to have it converted into an injunction. We have our motion to confirm the arbitrator's award. We have our motion for a judgment conforming to the arbitrator's award. We have a motion that was made orally at the last hearing but, essentially, an order — or a motion for a finding of contempt for their failure to obey the temporary restraining order.

Also pending is the plaintiff's motion to vacate or modify the arbitrator's award. And so that I think that, today, those motions are — are pending and need to be resolved.

THE COURT: Okay. Do you have a copy of the order?

MR. WILLIAMS: I have a copy of the temporary restraining order. I did not bring a copy. I inadvertently left the amended restraining order at the office, but my secretary's bringing it and it'll be here in a few minutes.

THE COURT: Okay. Well, let's begin with the motion to convert the TRO to a preliminary injunction.

MR. WILLIAMS: Okay.

THE COURT: Do you want to say anything about that?

MR. WILLIAMS: I do, Your Honor. I would like to.

Essentially, the elements are the same. What I mean the elements are the same, the elements for obtaining

MR. COLESSIDES: Okay.

THE COURT: All right?

MR. COLESSIDES: I understand that.

THE COURT: Okay. And go ahead and tell me, then, what your arguments are on converting the TRO to preliminary or permanent injunction.

MR. COLESSIDES: Your Honor, the basis for — as you look at the award, Your Honor, the award does not, under any circumstances, provide for the return of monies and for the return of a truck. As you look at the award, Your Honor —

THE COURT: I'm not talking about the award. I'm talking about the Court's order that's in place, that's been in place for, I don't know, a month and a half, I guess.

MR. COLESSIDES: And this is the — this is the dilemma that we have, Your Honor.

THE COURT: All right. Well, your clients obey the Court's order, okay? That's what they do. I don't care what the arbitration — for the purpose of this Court's order, it doesn't matter what the arbitration award is. That's the order. And that's what they comply with, okay?

Now, we can deal with these other issues, and if it's necessary to do that, fine. But the reason that order was put in place was to maintain the status quo. And that was — that was what the Court said. And that followed the

wrote a check out of the company account not only to pay the arbitrator fees but to pay their personal legal fees. We have an issue with that. But, nonetheless, we would be willing to stipulate that the money that is in the account be used to satisfy or to pay — to make good that check, and then we'll take up the fact that they still owe that money to the company at a later date. But we would — we would stipulate that that money go to the arbitrator.

THE COURT: All right. Well, Court will order that the account be unfrozen and that the arbitrator's check be honored.

MR. WILLIAMS: Okay.

THE COURT: Any additional money would be assets of the company.

MR. WILLIAMS: Thank you, Your Honor.

MR. COLESSIDES: Is the Court going to take the issue of the award, the confirmation of the award, Your Honor?

THE COURT: I don't think that today is the day to do that. I think we need to hear, perhaps, more evidence on that issue. I don't want to even go into that until we have the status re-established. So we can set another time to do that.

MR. COLESSIDES: For purposes of this hearing, Your Honor, may I make a pro forma objection? That is —

THE COURT: All right. If there's any issue regarding cooperation in dealing with that, I assume you'll bring it to the attention of the Court.

MR. WILLIAMS: We will.

THE COURT: Okay. Then we'll be in recess.

MR. COLESSIDES: Thank you.

THE COURT: Thank you.

(Whereupon, at the hour of 11:58 a.m., the hearing was concluded.)

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SALT LAKE CITY, UTAH; FRIDAY, OCTOBER 14, 2005, 2:05 P.M.

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THE COURT: Good afternoon.

MR. COLESSIDES: Good afternoon, sir.

THE COURT: Apparently, we had a matter scheduled that didn't get on our calendar today. We apologize for the delay. Counsel, do you want to state your appearances?

MR. COLESSIDES: Nick J. Colessides appearing on behalf of the plaintiffs, Your Honor.

MR. WILLIAMS: David Williams appearing on behalf of the defendant, Your Honor.

THE COURT: Okay. We have a couple of matters that are, apparently, pending. One's a proposed order confirming the arbitration award, and we have also, as I see the file, a motion by the plaintiffs to vacate the arbitrator's award. That was filed back in August.

Okay. Are there other matters that are -- to consider today?

MR. COLESSIDES: Your Honor, yes. There's a couple of matter.

Insofar as — and the minor item is something we agreed upon between Mr. Williams and myself. As it relates to the truck which was already returned to the credit union, we made the agreement that Mr. Duke may take — because there's no equity in the truck, Your Honor — may take the

MR. COLESSIDES: 2001.

THE COURT: And the section dealing with vacating the award was last changed May 15th, 2003. So, it would seem to me that, if that's true, that — you know, the legislature obviously could have changed that. They could have stuck in some language that would have modified it or, you know, qualified it some way. They didn't do that. If there's a — if there's a technical problem regarding notifying the State — or the corporations department, I would assume that, when the — when the order is confirmed by the Court, which is the prerogative of either party to the arbitration award, I assume, then if it's necessary to notify the State at that point, they can be notified.

And, in that sense, I suppose it is even qualified as a judicial determination. But I don't see — I don't see this as exceeding the arbitrator's award. And if that's the only issue that we're talking about, I would — I would find that, as a matter of law, that that does not exceed the arbitrator's authority.

Do you have — is there another point where you think —

MR. COLESSIDES: The only point I'm making, Your Honor, is I don't quite know if that specific version of the — the specific portion of the Act, Exceeding Authority, is not — does not — precedes 2001 and may go back to 1990.

for other reasons. For example, as I've indicated, I think that the fact that this order is subject to being confirmed judicially that it then becomes a judicial determination in the same sense as required under the statute. So, either way, I think that it's covered. And, certainly, you could challenge that in an appropriate forum at an appropriate time.

MR. COLESSIDES: I understand that, Your Honor.

May I ask a clarification, Your Honor?

THE COURT: Sure.

MR. COLESSIDES: AS I see the award — as I understand the ruling of the Court, it would be that it confirms the award as stated in No. 1, 2, 3...

THE COURT: Well, I think the award is unusual in that the arbitrator goes on to say —

MR. COLESSIDES: Right.

THE COURT: — that he's adding some additional paragraphs —

MR. COLESSIDES: Right.

THE COURT: — not by way of findings or conclusions but by way of clarification and explanation.

MR. COLESSIDES: And my —

THE COURT: And I've seen a lot of arbitration awards over the years; I've never seen that kind of language included in an award. I haven't read that many by

Arbitrator Scott, but I think the award has to be looked at in the context of all of the pages from the beginning until the end, and whether it's by clarification or by explanation or whatever, and I think it has to be read in its entirety. And I don't intend, in confirming the award, which I would do unless there's some other point that's made that would convince me not to, I would not intend to confirm only a part of that award or the first 16 lines of that award but, rather, the entire award, from the beginning all the way to the end. And I — let me see how many pages we've got here.

MR. COLESSIDES: Pages 1 through 8, Your Honor. That's the eighth, the signature page.

THE COURT: Yeah. I think that it would be all —

MR. COLESSIDES: Okay.

THE COURT: — all eight pages.

MR. COLESSIDES: All right. You would adopt them — the Court would adopt them, what the arbitrator — and that's for clarification purposes so I'll know which way the Court is ruling, Your Honor. Because I am at a loss, somehow, to explain the arbitrator's language on line 10 of page 3 that says the comments are not to be construed or taken to be findings of fact or conclusions of law.

So I do not — with all due respect, Your Honor, when the Court confirms the award, do you confirm that part of the award as a — as a part of the order?

THE COURT: I do.

MR. COLESSIDES: Okay.

THE COURT: He says that they are provided to assist the parties and their counsel to understand the reasons that form the basis for the award. However, he calls them findings of fact or conclusions. I don't think he has to. I think he's saying, "These are the reasons why I've given my award." And I think they are of an assist in trying to understand the whole context of the award.

MR. COLESSIDES: Okay. I just wanted to make that — help me understand that part, Your Honor.

THE COURT: Okay.

MR. COLESSIDES: You're not limiting the award to the award only, but you're including, by reference, everything else. Okay. Thank you, Your Honor. That's all.

THE COURT: Okay.

MR. WILLIAMS: Your Honor, and I guess I apologize if you hadn't ruled, but I — if you have ruled, I would like to submit a —

THE COURT: Well, I understand from Mr. Colessides that he has nothing further to add. So based on that, my — my ruling would be, as I indicated, that I would confirm the award from page 1 through page 8, the entire document, as the award in this matter.

MR. WILLIAMS: Your Honor, I have submitted, and I

judgment as well as attaching it as an exhibit, just so that I would be sure to comply with that rule.

THE COURT: So you're not adopting by reference, you're just repeating verbatim everything in the award.

MR. WILLIAMS: Yeah.

THE COURT: So your representation to me and to Mr. Colessides is that, other than misspelling "judgment," you have copied everything verbatim, including nothing more, and leaving out nothing, than is set forth in the award, other than the beginning statements and the concluding signatures.

MR. WILLIAMS: Yes, Your Honor. There may be — oh, there is one — there is one change. On page 4 —

THE COURT: All right.

MR. WILLIAMS: — right under where it says "Arbitrator's Written Comments."

THE COURT: Uh-huh.

MR. WILLIAMS: "At the request of the parties, the arbitrator is..."

THE COURT: Uh-huh.

MR. WILLIAMS: I inserted that language because he used — I think he named himself or "I am." He said, "At the request of the parties, I am providing..."

THE COURT: Okay. So —

MR. WILLIAMS: And just by bracket, I said the

arbitrator is rather than saying "I am."

THE COURT: All right. Okay. Well, it would appear to me that this is in order. I don't know that it does anything different from signing the confirmation order that I've signed. So I'm going to go ahead, unless Mr. Colessides wants to state some other substantive objection.

MR. COLESSIDES: I have not had an opportunity, Your Honor, to review it. I just looked at it as it was given to me.

THE COURT: All right. I'm going to sign it. I'll give you — if you need 30 days to — if you want to raise an objection, I'll be happy to let you do it.

MR. COLESSIDES: Thank you, Your Honor.

THE COURT: Okay. Okay. Again, I want to compliment counsel on both sides. I think you've both done a superb job in trying to educate the Court and brief this matter. I think your representation of your clients has been vigorous and has been thorough. I compliment both of you on that. I wish everybody who came in did such a thorough job.

Obviously, in these cases, one side prevails and one side doesn't prevail. In this case, it would appear to the Court that the defendants have prevailed and they would be entitled to your relief under that — under that

conclusion.

I would just reiterate what I said. I think I've arbitrated personally over the years, as an advocate, maybe 150 arbitration cases. I have served as an arbitrator also on a number of cases. And I feel that it is a — it is a good system, but one of the reasons it's good is because the award of the arbitrator has such a potential finality. And in this instance, it's obvious that the plaintiffs don't agree with what the arbitrator did and, you know, that's their prerogative. But that doesn't mean that it shouldn't be enforced under the law.

So, again, thank you. I compliment you on what you've done. And, unless there's something further, we'll be in recess.

MR. COLESSIDES: Thank you, Your Honor.

MR. WILLIAMS: Thank you, Your Honor.

(Whereupon, at the hour of 3:06 p.m., the hearing was concluded.)

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CERTIFICATE OF SERVICE

Filed **ten** copies of the foregoing, one of which contains an original signature, with the Clerk of the Supreme Court:

OFFICE OF THE CLERK OF THE COURT
SUPREME COURT OF THE STATE OF UTAH
450 SOUTH STATE STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH 84111-1860

and served **two** copies of the foregoing upon the following:

David R. Williams (Attorney for all defendants herein)
Woodbury & Kesler, PC
265 East 100 South, Suite 300
Salt Lake City, Utah 84110-3358

via first class mail, postage pre-paid, this 4th day of May, 2006, addressed as set forth above.